Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-77

JAMES HARRIS - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

JAMES HARRIS - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Warren Earl Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by James Harris for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case.

I. OPINIONS DELIVERED IN COURTS BELOW

The Opinion of the Court of Appeals is not yet reported and appears at Appendix A. As the legal issues presented to the Court of Appeals were decided

in the case involving similar facts in *United States* v. *Eisner,* —— F. 2d —— (6th Cir. 1976), the Opinion of the Court of Appeals in that case is appended at Appendix B and is not yet reported.

II. JURISDICTIONAL STATEMENT

The date of the judgment of the Court of Appeals sought to be reviewed and the date of its entry is May 19, 1976. An order of the Court of Appeals denying a timely filed petition for rehearing was entered June 21, 1976 and appears at Appendix C. This court's jurisdiction is invoked under 28 U.S.C. 1254(1).

III. QUESTIONS PRESENTED

1. Whether under 18 U.S.C. § 1952—The Travel Act, which provides that whoever uses any facility in interstate commerce with intent to violate the prostitution laws of a state and "thereafter" performs or attempts to perform such unlawful acts of prostitution, the use of the word "thereafter" means the unlawful acts of prostitution must be performed after the use of any such facility in interstate commerce, so that if the sequence of events and the use of such interstate facility is after rather than before the unlawful acts of prostitution, no federal offense is committed.

2. Did respondent offer evidence as statutorily required that after the use of facilities of interstate commerce petitioner performed or attempted to perform illegal activities consisting of a business enterprise involving prostitution, lewdness and assignation?

3. Does the word "lewdness" employed in KRS 436.075 embrace masturbation not performed in public view?

4. Did the court's instruction to the jury to disregard the testimony of Gail Jones cure the error of permitting her to testify?

5. Should petitioner's motion for judgment of acquittal have been granted?

IV. STATUTES INVOLVED WITH LEGISLATIVE HISTORY

1. Title 18, United States Code, § 1952:

> "§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.—(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000.00 or imprisoned for not more than five years, or both.
>
> (b) As used in this section, 'unlawful activity' means (1) any business enterprise involving gam-

bling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

2. KRS 436.075:

"436.075 Prostitution, lewdness and assignation.

(1) That the term 'prostitution' as used in this Act shall be construed to include the giving or receiving of the body for sexual intercourse for hire, and shall also be construed to include the giving or receiving of the body for indiscriminate sexual intercourse without hire. That the term 'lewdness' shall be construed to include any indecent or obscene act. That the term 'assignation' shall be construed to include the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement.

(1942 c 135, § 1. Eff. 6-1-42)

(2) It shall be unlawful to engage in prostitution or to aid or abet prostitution or to procure or solicit any person for the purposes of prostitution, or to keep or set up a house of ill-fame, brothel, or bawdy house, or to receive any person for the

purpose of lewdness, assignation or prostitution into any vehicle, conveyance, place, structure or building, or to permit any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building, or to direct, take or transport, or to offer or agree to take or transport, any person to any vehicle, conveyance, place, structure, or building, or to any other person with knowledge or reasonable cause to know that the purpose of such directing, taking or transporting is prostitution, lewdness, or assignation, or to lease or rent or contract to lease or rent any vehicle, conveyance, place or structure, or building, or part thereof, knowing or with good reason to know that it is intended to be used for any of the purposes herein prohibited.

(1942 c 135, §2. Eff. 6-1-42)

(3) Any person violating any provision of this act shall be fined not exceeding two hundred dollars or confined in the county jail for not more than one year, or both so fined and imprisoned.

(1942 c 135, § 3. Eff. 6-1-42)

(4) This act shall in no wise repeal any laws of the Commonwealth of Kentucky on the subject of prostitution and shall be construed by the courts as supplementary thereto. (1942 c. 135, §4. Eff. June 1, 1942.)"

3. Legislative History:

(a) Committee on the Judiciary, 87th Congress, 1st Session, page 2664, House Report No. 966, August 17, 1961, on travel or transportation in aid of racketeering enterprises:

"Also, the language in the Senate bill on page 2, line 7, 'after such travel' was eliminated as being superfluous due to the insertion of the word 'thereafter' following the word 'and' on page 2, line 5. This change will conform with the requirement that an act be performed subsequent to travel. Thus, there is required the commission of an overt act after having traveled or after having used the facilities of interstate or foreign commerce."

(b) Attorney General's testimony at the Senate hearing on June 6, 1961, taken from 107 Cong. Record, Part 10, p. 13943, and as quoted in footnote 10 on page 315 of U. S. v. Altobella, 442 F. 2d 310 (7 CA—1971):

"The Committee has tightened the bill to require that the individual doing the traveling for an illegal purpose must, after his travel, perform or attempt to perform one of the acts forbidden by the bill."

(c) Senate Report No. 644, 87th Congress, 1st Session, 1961, page 2, quoted on page 314 of Altobella, supra:

". . . to come within the provisions of the bill some activitiy in furtherance of a racketeering enterprise, subsequent to the performance of the travel, must take place . . . accordingly the gravaman of the offense will be travel and a further overt act to aid the enterprise."

V. STATEMENT OF CASE

Petitioner, James Harris, on June 2, 1974, was accused by indictment of the crime denounced by 18 USC § 1952 and 18 USC §2.

Count 2 of the Indictment was dismissed by the prosecution and Count 3 was severed for trial at a later date. Only Count 1 of the accusation is here involved.

To sustain the charge of the use of interstate facilities of commerce the prosecution offered evidence of bank clerks and petitioner concedes that such evidence was sufficient.

Petitioner was the manager of a night club in Newport, Kentucky, called the Jai-Alai on York Street and was active in that business during the times alleged in the indictment.

Among the customers of the club was respondent's witness, a Mr. Jack Trainer, who in payment of such bills as he might incur when a patron upon certain dates gave checks drawn on a Cincinnati, Ohio, bank to petitioner who subsequently through facilities of the West Side Branch of Newport National Bank of Newport, Ky. obtained payment thereof. These checks of Trainer by dates thereof, payee, amount, and dates of bank clearance are as follows:

SCHEDULE

Exhibit No.	Date of Check	Amount	Date Presented to Bank
4-D	August 16, 1973	$1400.00	August 21, 1973
4-C	August 23, 1973	2151.25	August 27, 1973
4-E	September 6, 1973	1800.00	September 12, 1973
4-F	September 11, 1973	1492.00	September 17, 1973
4-A	September 23, 1973	1957.50	September 26, 1973
4-G	October 2, 1973	2320.00	October 9, 1973
4-H	November 2, 1973	996.50	November 8, 1973
4-I	Illegible	1329.00	January 15, 1974
4-B	February 14, 1974	291.75	February 20, 1974

Mr. Trainer visited the club only at night and on most occasions after midnight, and it was upon such dates appearing in the schedule either at late night or in the darkness of early morning that the checks were given by him to petitioner. Mr. Trainer left the club at 3:00 A.M. (closing time) on each occasion of his visits.

In an effort to sustain the allegation of a violation by petitioner of KRS 436.075 respondent adduced from Mr. Trainer that on 4 or 5 occasions he engaged in masturbation. No dates of these maturbation episodes were established by the witness in relation to the dates he gave checks to petitioner. Nor did the witness establish whether his acts of masturbation were accomplished by *his* manual manipulation of his genitalia or through assistance of another. The acts took place at a table in the back of the Club and in an upstairs bedroom. In respect to the episode at the table witness testified masturbation occurred while he sat in the presence of a girl.

As maturbation is self abuse, self excitation, petitioner assumes that witness satisfied his libidinosity unaided. There is no direct evidence to the contrary but if it be argued by respondent that the mere presence of a female at the table where witness was sitting provides an acceptable inference that she assisted his emulation of Onan, yet this act performed while witness sat on a chair at a table cannot be charged to petitioner who was not shown to be present when witness' genitals were fondled either by himself or another, or that petitioner knew or approved witnesses' activity.

Petitioner digresses from narration of Statement to quote from the evidence at which point the prosecution was attempting to trace the money witness spent at the club:

"Q. Did that, any of that money go for the masturbation?

A. No, never spent money for masturbation, spent money for drinks.

Q. You testified that, yesterday, Mr. Trainer, that the girls would not sit at your table unless you bought them drinks; is that correct?

A. Yes.

Q. And is it also not correct that if you had not bought them drinks then that you would not have received masturbation?

A. That would be right, because they wouldn't be sitting there.

Q. So then is it not true that the money you paid for the drinks also went for the masturbation?

Mr. Vincent: We object.

The Court: Overruled.

Q. Isn't that a correct assumption?

A. In that light, yes.

Q. And also, Mr. Trainer, yesterday you testified that you were upstairs one time, I believe, to watch the second half of a football game. Is that the only time you were upstairs?

A. No.

Q. Would you explain to us what the other occasions were that you went upstairs?

A. Yes, on another occasion I went upstairs, as, frankly, it was too noisy downstairs and I went upstairs with one of the girls.

The Court: I didn't hear the last answer.

A. I went upstairs with one of the girls.

Q. And yesterday you testified that you did receive masturbation upstairs. Is that the occasion?

A. That's right.

Q. Or is this another occasion?

A. That would be the occasion.

Q. It is the occasion?

A. Yes.

* * * * * * *

Q. Now, Mr. Trainer, again I would like to ask you what type—first of all, whether or not these checks that you have testified to here today that you had seen, whether or not a portion of those checks, or any of the checks was paid for entertainment?

A. You mean just part of my bill, yes.

Q. Now what type of entertainment are you talking about?

A. All of this. This was all, this would all entail drinks.

Q. And the entertainment include any sexual activity?

A. No.

Q. Is it a fact, are you testifying that you did not give any of the checks for sexual activity, you don't consider the sexual activity entertainment?

A. Did not give the checks for sexual activity.

Q. Yes. Did any of the money go towards that?

A. No, the money went for drinks.

Q. Did you write any of the checks on the nights that you received any sexual activity?

A. Yes.

Q. So whether or not Mr. Harris applied any of that money to the girls or any other person involved in the sexual activity, you wouldn't know, would you?

A. No, Sir."

There was no evidence that Mr. Trainer visited the Jai-Alai Club except upon the date the checks were written and given to appellant.

The United States offered evidence by Grieve and Gunning of laundry service to the club during the period laid in the indictment consisting of the pick up soiled bar towels, tablecloths, roller towels, kitchen towels, bar wipers, sheets and pillow cases and delivery of these accessories to the club after laundering.

The only other witnesses for the prosecution were the bank employees, Lynn and Richardson. No further reference is made to their testimony as petitioner concedes that their evidence established that the Trainer checks moved in interstate commerce *but only*

subsequent to Trainer's masturbation in the Jai-Alai Club.

At the conclusion of this evidence for the prosecution petitioner moved for judgment of acquittal which the Court took under submission and denied same after sentence.

By amended judgment petitioner was sentenced to incarceration for two years and to pay a fine of $5,000.00. He has been enlarged upon bail by order of the Court of Appeals.

The basis for federal jurisdiction in the court of first instance is United States Constitution, Art. III, Section II.

VI. REASONS FOR ALLOWANCE OF THE WRIT

1. The Decision Below and the Decisions of the Fourth Circuit Court of Appeals Are in Conflict With the Decisions of the Seventh Circuit Court of Appeals in the Interpretation and Application of 18 U.S.C. § 1952—the Travel Act.

In footnote 5 on the bottom of page 12a of its Opinion in *Eisner* (Appendix C, pp. 27-39), the lower court says:

> "The Fourth and Seventh Circuits have at various times attempted to reconcile their respective views on this issue. At this point any such attempt on our part would be fruitless. In *Isaacs* the Seventh Circuit acknowledged that its view was in conflict with the ruling made in *Wechsler*. 493 F. 2d at 1149. In *LeFaivre* the Fourth Circuit acknowledged that unless the Seventh Circuit

> decisions were limited to their precise factual settings, and there is little evidence in the language of these decisions that they are no limited, then its view was in conflict with these decisions. 507 F. 2d at 1294."

The conflict between the Circuits is directly brought into the open when the Sixth Circuit then follows up in the body of its Opinion (Appendix C, pp. 27-39) saying: "We also decline to adopt the approach taken by the Seventh Circuit and, rather, apply the rule stated by the Fourth Circuit in LeFaivre."

The questions of whether the acts and conduct alleged in the indictment and brought out in the evidence even constitute a violation of § 1952 are, at the most, uncertain. Of paramount importance is the interpretation and application of the word *"thereafter"* in 18 U.S.C. § 1952—the Travel Act, as it relates to the timing or sequence of the use of an interstate facility and the unlawful act itself. If, as petitioner urges, the indictment and facts in this case do not come within the Travel Act in the first place, and that, if it is governed by the Travel Act, the use of an interstate facility, that is, the receiving and presenting of a check from a customer to a bank in one state, which bank then places the check through the Bank Clearing System to a bank in another state for payment, then it must precede and not come *after* the unlawful activity, and if it comes *after* the unlawful activity, no federal offense is committed under 18 U.S.C. § 1952, and the federal courts do not have jurisdiction. It then be-

comes purely a local matter for the enforcement of prostitution laws.

Both the District Court and the Sixth Circuit Court of Appeals cast their lots with the Fourth Circuit, following the reasoning of *United States* v. *LeFaivre,* 507 F. 2d 1288 (1974), cert. denied 420 U. S. 1004, 95 S. Ct. 1446 (1975), concluding that an on-going operation leaves no doubt that there was an intention to violate Kentucky law. The Fourth Circuit also dealt with Section 1952 violations in *United States* v. *Wechsler,* 392 F. 2d 344 (1968), cert. denied 392 U. S. 932, 88 S. Ct. 2283, 20 L. Ed. 2d 1389 (1968), where it upheld a Travel Act conviction founded upon a local official depositing into his bank account an out-of-state check that had been received as a bribe. And similarly in *United States* v. *Salsbury,* 430 F. 2d 1045 (1970) where it upheld a Travel Act conviction founded upon the cashing of out-of-state checks in connection with gambling operations.

It has been held that each separate use of a facility of interstate commerce is a separate violation of Section 1952. *United States* v. *Polizzi* (9 CA—1974), 500 F. 2d 856, cert. denied 419 U. S. 1120, 95 S. Ct. 802, 42 L. Ed. 2d 820. Assuming that delivering a check for payment to a bank in one state, which bank (not the depositor) then places it in interstate commerce through the Bank Clearing System, is the use of an interstate facility (which conclusion petitioner denies) the fact remains that if each separate use of a facility of interstate commerce with intent to commit an unlawful activity (prostitution) is a separate offense, the

use of the facility was *after* the commission of the unlawful activity. Section 1952 providing that the unlawful activity of prostitution must *thereafter* be performed, clearly there is no violation.

The Seventh Circuit has decided contrary to the Fourth Circuit. In the case of *United States* v. *Zemster,* 501 F. 2d 540 (7 CA—1974), the Seventh Circuit was presented with a parallel fact situation except that there "travel" was alleged, whereas in this case the use of "facilities of interstate commerce" was charged. The holding was that the use of interstate facilities was only incidental to the violation of state law, and the problem was that the charge in the indictment did not comply with the statutory requirement concerning the sequence of interstate travel and the violation of state law, and, therefore, charged no offense. It pointed out that for a person to be guilty of a violation of Section 1952, he must have "used a facility in interstate commerce to facilitate the carrying on" of an illegal enterprise as defined by state law "and thereafter performed the carrying on" of the unlawful activity. The "thereafter" clause constituted an express limitation on the coverage of the statute, the Seventh Circuit held.

The Seventh Circuit in *United States* v. *Altobella,* 442 F. 2d 310 (1971) involved the use of the mails by bank through which extortion victim's check drawn on a Pennsylvania bank was cleared after it had been cashed in Illinois, and that Court stated that the squalid facts of the case gave rise to a serious question of federal jurisdiction under the Travel Act—18 USC

§ 1952, concluding that the prosecution was beyond the limits of the criminal jurisdiction which Congress intended to confer on federal courts. Also, the Seventh Circuit dealt with whether a minimal and incidental use of an interstate facility can give rise to a violation of the Travel Act. *United States* v. *McCormick,* 442 F. 2d 316 (1971); *United States* v. *Isaacs,* 493 F. 2d 1124 (1974), cert. denied 417 U. S. 976, 94 S. Ct. 3183, 41 L. Ed. 2d 1146 (1974).

The legislative history of Section 1952 is to the effect that the Committee tightened the bill to require that an individual who travels for an illegal purpose must *thereafter* perform or attempt to perform a forbidden act; that to come within the provisions of the law some activity subsequent to the performance of the travel (in this case use of interstate facilities) must take place. Or, as stated in House Report No. 966 that by the insertion of the word "thereafter" it made the bill conform to the requirement that there is required the commission of an act *after* having used the facilities of interstate commerce. These will be more fully discussed if certiorari is allowed.

This conflict justifies the allowance and grant of certiorari to review the judgment below.

2. The Decision of the Court of Appeals Is Supported by No Evidence That After the Use of a Facility of Interstate Commerce Petitioner Violated KRS 436.075.

Respondent offered no evidence of any violation of Kentucky law after use of a facility of interstate commerce by petitioner. Placing the checks in commerce in no way offended the Kentucky Statute.

3. The Decision of the Court of Appeals in Holding That "Lewdness" employed in KRS 436.075 Embraces Masturbation Not Performed in Public View Is a Decision of an Important Question of Local Law in a Way Probably in Conflict With Applicable Local Decisions.

The salient language of the indictment is *the carrying on of an unlawful activity, said unlawful activity being a business enterprise involving prostitution, lewdness, and assignation, in violation of the laws of Kentucky, under KRS 436.075.*

Although the indictment alleges *assignation,* the record is without any evidence to sustain the charge within the definition of the word furnished in the statute as *the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement.* There is no proof that petitioner mad any appointment or engagement for prostitution or lewdness or did any act in furtherance of such appointment or engagement. The only witness for the United States establishing any impropriety was Trainer. Petitioner made no appointment or engagement with him for prostitution,

or for any other purpose. Trainer was but a casual customer of the Jai Alai Club, patronizing it for the purpose of drunkeness and seclusion for masturbation. His acts cannot be charged to petitioner.

So also the inclusion of *lewdness* in the indictment is by the statute confined to *any indecent or obscene act.* There is no proof that petitioner performed or engaged in any indecent or obscene act and there is no proof of any act of petitioner whatsoever, but only an inference of his receipt of Trainer's checks from the fact of their admission into evidence.

Trainer's masturbation cannot be charged to petitioner and under Kentucky law his self-abuse, whether assisted by another or not, and indulged or enjoyed in private as the proof establishes beyond any doubt, was not *lewdness.* See *Coleman* v. *Commonwealth of Kentucky,* Ky., 247 S. W. 2d 535 (1952) and *Commonwealth* v. *Hamilton,* 237 Ky. 682, 36 S. W. 2d 342 (1931). The record is bare of any testimony that any act of Trainer was seen by any other than himself and his assistant, if he had one, was not in public, but only a private sin as proscribed by Judeo-Christian Doctrine, not violative of any statute or common law of the state.

It is absurd and out of harmony with reason that in enacting 18 USC Section 1952 the Congress sought to punish a tavern owner for his customer's self-abuse paid for with a check which moved through a facility of interstate commerce.

So if respondent's case be considered as made out then the proof must have sustained the indictment's

allegation of *prostitution.* So it is reasoned in Judge McCree's able dissent. To attempt its improvement would be to "gild the lily." It is in harmony with the pronouncement of the Kentucky court construing KRS 436.075 in *Shawhan* v. *Commonwealth,* Ky., 318 S. W. 2d 541, 543 (1952) where it is written:

> "The trial court, as well as the Commonwealth, took the position that KRS 436.075(2) denounced one offense with sundry ways of violating it. We do not agree. The statute denounces not one but several separate and distinct offenses. Though there is a factual connection between these charges and though each is charged with a violation of the same section of the Kentucky Revised Statutes, the offense charged against Kitty Shawhan is separate and distinct from other charges, as the definition of prostitution in KRS 436.075(1) clearly indicates."

As the dissent points out and the statute provides the term *prostitution* is the giving or receiving of the body for sexual intercourse for or without hire. Prostitution is statutorily defined as consisting of copulation—the union of the male reproductive organ in sexual congress with the female vaginal tract. It does not include masochism, sadism, flagellation or other repulsive sexual deviations of which there are myraid forms as described by Havelock Ellis in his extensive work *"Psychology of Sex."*

The indictment is laid under 18 USC Section 1952 and 18 USC Section 2 and while respondent does not press its case under Section 2, the court's attention is

called to *Eisner* v. *Commonwealth,* Ky., 375 S. W. 2d 825, 827 (1964) where this language appears:

> "The ordinary use of the term 'engaging in prostitution' does not contemplate that a man can commit that act. See State v. Gardner, 174 Iowa 748, 156 N. W. 747, L. R. A. 1916D 767; People v. Brandt, Cal. Super., 306 P. 2d 1069. Moreover we observe that, while KRS 436.075(1) has generally defined 'prostitution,' this sub-section has not expressly extended the usual and ordinary definition of that word to include men. While O'Brien may be prosecuted for some other criminal offense, such as 'fornication' (KRS 436.070), we hold that he cannot be convicted of engaging in prostitution as that offense is presently denounced by KRS 436.075. Hence, he was not an accomplice and an accomplice instruction was not required to be given."

As petitioner could not be guilty of prostitution under KRS 436.075, it follows that he could not have been an accomplice and charging under Section 2 was redundant.

It is submitted that no layman and probably no student of the law upon reading Section 1952 would conclude that the act of a customer of a whiskey bar who masturbates in the saloon premises and then pays for his beverage and pleasure with an interstate check, would subject the barkeeper to prosecution under the Travel Act. And that is the precise situation presented by this appeal.

The footnote appended to the Per Curiam infers that the dissent *omits reference to important facts*

and law. But the court's comment on separate and distinct offenses proscribed by the statute, such as *to keep or set up a house of ill fame, brothel or bawdy house,* or *to receive any person for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure or building,* or *to permit any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure or building,* or *to direct, take or transport or to offer or agree to take or transport, etc.,* is but a recitation of offenses with which petitioner was not charged. It thus appears that the judgment herein could not be pleaded in bar of a subsequent indictment for setting up a bawdy house, or for any other separate and distinct offense denounced by the statute other than prostitution.

VII. CONCLUSION

WHEREFORE, James Harris, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-entitled case.

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CEFTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Hon. Eldon Webb, United States Attorney, 326 Post Office Building, P. O. Box 1490, Lexington, Kentucky 40501, and to Solicitor General, Department of Justice, Washington, D. C. 20530. I further certify that all parties required to be served have been served.

Howell W. Vincent

HOWELL W. VINCENT
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APPENDIX

APPENDIX A

No. 75-1862

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

JAMES HARRIS, - - - - *Defendant-Appellant.*

ORDER—Filed May 19, 1976

Before: PHILLIPS, Chief Judge, EDWARDS and MCCREE, Circuit Judges.

On review of the briefs, record and oral arguments in the above-styled case, we find evidence and permissible inferences from which the jury could properly have concluded that appellant Harris employed facilities of interstate commerce in cashing nine checks totaling over $13,000 between August 16, 1973 and February 14, 1974, and that a major portion of the proceeds of such checks were subsequently employed, in accordance with appellant's specific intent, to facilitate the carrying on of a business enterprise, the Jai-Alai Club in Newport, Kentucky, which involved prostitution, lewdness or assignation in violation of former K.R.S. 436.075 (Act of March 11, 1942, ch. 135) (repealed effective January 1, 1975) and that said activities constituted violation of the Travel Act, 18 U.S.C. § 1952 (1970); and

Further noting that the legal issues presented in this appeal have been decided in a case involving generally

parallel facts (albeit on somewhat stronger proofs) in *United States* v. *Eisner*, ___ F. 2d ___ (6th Cir. 1976). (*See also United States* v. *Gebhart*, 441 F. 2d 1261 (6th Cir.) *cert. denied*, 404 U. S. 855 (1971)).[1]

Now, therefore, for the reasons outlined above and further explicated in *United States* v. *Eisner*, supra, the judgment of conviction is affirmed.

ENTERED BY ORDER OF THE COURT.

(s) JOHN P. HEHMAN
Clerk

McCREE, Circuit Judge (Dissenting). I respectfully dissent. The indictment in this case charging appellant with the facilitation of "the carrying on of an unlawful activity, said unlawful activity being a business enterprise involving prostitution, lewdness, and assignation in violation of the laws of Kentucky, under K.R.S. 436.075 . . ." states an offense under the Travel Act proscription of interstate facilitation of prostitution. 18 U.S.C. §§ 1952(a)(3), (b)(1). Therefore, appellant's conviction must be supported by proof of prostitution in order to satisfy the Kentucky statute as well as the Travel Act that incorporates the Kentucky law by reference.

[1]The dissent in arguing that only hired female-assisted masturbation is specifically proved on this record and that such proof does not establish a violation of the Travel Act, omits reference to important facts and law: 1) the Jai Alai Club maintained upstairs a furnished bedroom, 2) its laundry for six months during the period in question included 398 sheets and pillow cases, 3) the Kentucky statute alleged to be violated provided in part that it was unlawful for anyone "to keep or set up a house of ill-fame, brothel, or bawdy house, or to receive any person for the purpose of lewdness, assignation or prostitution into any vehicle, conveyance, place, structure or building, or to permit any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building," (Act of March 11, 1942, ch. 135, § 2) and 4) 18 U.S.C. § 1952(a)(3) & (b)(1) (1970) prohibits use of interstate facilities to facilitate (among other unlawful activities) "prostitution offenses in violation of the laws of the state in which they are committed. . . ."

The superseded Kentucky statute set forth in the indictment expressly declares that prostitution is different from the other conduct listed. It defines assignation as "the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement," and lewdness (with a disturbing vagueness) as including "any indecent or obscene act." It defines prostitution as including only "sexual intercourse for hire" or "indiscriminate sexual intercourse without hire."

The generally accepted definition of sexual intercourse is the introduction of the male sexual member into the female vaginal tract. Accordingly, the order of the court affirming the conviction in this case erroneously states that there is "evidence and permissible inferences . . . [that appellant facilitated] the carrying on of a business enterprise . . . which involved prostitution, lewdness and assignation. . . ." The only record evidence of sexual activity in the Jai-Alai Club concerns some instances of masturbation practiced by female employees upon male customers. The term masturbation as used by the witnesses at trial indicated that it involved the manual stimulation of the genitals, usually to orgasm.

Since the Travel Act and the Kentucky prostitution statute impose criminal sanctions, they should be strictly construed against criminal liability (*see United States* v. *Bass*, 404 U. S. 336 (1971) and *United States* v. *Dalpiaz*, 527 F. 2d 548 (6th Cir. 1975), and should not be interpreted to include other sexual conduct that is not within the ordinary meaning of the word "intercourse" since a contrary intent is not manifested in express language. Because there is no proof of prostitution, an essential element of the offense charged, I would reverse the conviction.

APPENDIX B

No. 75-1862

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

JAMES HARRIS, - - - - *Defendant-Appellant.*

ORDER—Filed June 21, 1976

Before: PHILLIPS, Chief Judge, EDWARDS and MCCREE, Circuit Judges.

On receipt and consideration of a petition for rehearing and a suggestion for rehearing in banc in the above-styled case; and

No active judge of this court having moved for rehearing in banc under Rule 35 of the Federal Rules of Appellate Procedure; and

The motion for rehearing therefore having been referred to the panel which heard the case; and

The panel having noted no material matter in said motion for rehearing which was not considered prior to the issuance of the opinion of the court,

Said motion for rehearing is hereby denied. Judge McCree would grant the petition for the reasons stated in his dissenting opinion.

ENTERED BY ORDER OF THE COURT.
(s) JOHN P. HEHMAN
Clerk

APPENDIX C

No. 75-1908

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

CALLIE BLAINE EISNER, - - *Defendant-Appellant.*

Appeal from the United States District Court for the Eastern District of Kentucky

OPINION—Decided and Filed April 14, 1976

Before: EDWARDS and MILLER, Circuit Judges, and CHURCHILL, District Judge.*

CHURCHILL, District Judge. The appellant was charged in a two-count indictment with violation of 18 U.S.C. § 1952, commonly known as the Travel Act. This Act makes it a federal crime to use a facility in interstate commerce to facilitate the carrying on of an unlawful activity and thereafter engage in the unlawful activity. The Act defines unlawful activity to include any business enterprise involving prostitution offenses as defined by state law. In both counts the alleged unlawful activity was prostitution, lewdness,

*Honorable James P. Churchill, United States District Judge for the Eastern District of Michigan, sitting by designation.

and assignation in violation of Kentucky Revised Statutes § 436.075. In the first count the alleged interstate element of the offense was the use of the bank clearing system. In the second count the alleged interstate element was the transportation of a prostitute across state lines. After a bench trial the appellant was found guilty of the first count and not guilty of the second count.[1]

The testimony can be summarized as follows. The appellant between August 13, 1973, and February 22, 1974, the dates specified in the indictment, was the owner of a night-club known as the Pink Pussycat located in Newport, Kentucky. Bernice Jones was the manager of the club.[2] The club employed dancers of the exotic variety. The testimony of one of the dancers, Tracy Tippit, and one of the customers, Jack Trainer, established that various dancers engaged in a variety of sexual acts with various customers for a price. Bernice Jones handled the day-to-day operation of the club. Tracy Tippit testified that on one occasion the appellant was present at the club when other dancers went into the back room with customers. Bernice Jones testified that she had been hired by the appellant, that the appellant kept the daily ledgers, and that the appellant often paid the dancers.

Jack Trainer paid for his entertainment with checks drawn on a Cincinnati bank. A total of fifteen (15) checks were introduced at the trial. Five of these checks were

[1]The trial judge in his memorandum of decision and the government in its brief, to satisfy the Travel Act's requirement that there be the use of a facility in interstate commerce. rely in part on the fact that the defendant placed ads in certain Cincinnati newspapers. The indictment makes no mention of these acts, and this variance from the indictment cannot be the basis of a conviction. *United States* v. *Zemater*, 501 F. 2d 540, 544, fn. 11 (CA 7 1974).

[2]Bernice Jones was charged along with Callie Blaine Eisner in both counts of the indictment. She also was found guilty of the first count and not guilty of the second count. Jones has not appealed her conviction.

made out to Cash, three were made out to the Pink Pussycat, and the remainder were made out to Bernice Jones. Two of the checks, in amounts of $333.50 and $839.25 respectively, were signed in the name of the appellant as the endorser. The checks were negotiated at the State Bank of Dayton in Kentucky. Three of the checks were deposited into the account of the Pink Pussycat. The remainder were cashed. The checks were then delivered to the maker's bank in Ohio, where they were charged to his account, and the funds were then remitted back to the Kentucky bank.

Appellant assigns four claims of error.

I. SUFFICIENCY OF EVIDENCE

The appellant asserts that certain findings of fact were not supported by the evidence. The appellant acknowledges that acts of prostitution did take place at the Pink Pussycat but asserts that there was insufficient evidence to support a finding that such acts took place with her knowledge and consent. In considering a contention that the evidence is insufficient to support judgment of conviction, an appellate court will reverse the judgment only if it is not supported by substantial and competent evidence. *United States* v. *Kubeck*, 487 F. 2d 1256 (CA 6 1973). Where, as here, the evidence is wholly circumstantial, the same test applies; and it is not necessary that such evidence remove every reasonable hypothesis except that of guilty. *United States* v. *Morgan*, 469 F. 2d 83 (CA 6 1972). A review of the testimony summarized above indicates that there was substantial and competent evidence to support the court's finding that these activities took place with the knowledge and consent of the appellant.[3]

[3]The appellant's reliance on *United States* v. *Barnes*, 383 F. 2d 287 (CA 6 1967), *cert. denied* 389 U. S. 1040, 88 S. Ct. 780, 19 L. Ed. 2d 831(1968), is misplaced. There, the issue was not whether

(Footnote continued on following page)

II. EXTENT OF USE OF A FACILITY IN INTERSTATE COMMERCE

The appellant asserts that the mere deposit or cashing of an out-of-state customer's checks, knowing that the checks will travel from Kentucky to Ohio, is such a minimal and incidental use of an interstate facility that it cannot give rise to a violation of the Travel Act. The relevant statutory language reads as follows:

> "§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.
>
> "(a) Whover travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> "(1) distribute the proceeds of any unlawful activity; or
>
> "(2) commit any crime of violence to further any unlawful activity; or
>
> "(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

---

the defendants knew of the illegal enterprise but rather whether they knew that a facility in interstate commerce was used to facilitate the illegal enterprise. The government argued that it did not have to prove that all of the defendants knew of the use of the interstate facility. This Court rejected that argument and held that each defendant must have reason to know of the use of an interstate facility. This view was reaffirmed in *United States* v. *Prince*, ___ F. 2d ___ (No. 75-1751, February 11, 1976). In this case the government proved that the appellant had reason to know of the use of an interstate facility.

A number of cases have dealt with this issue.

In *United States* v. *Wechsler*, 392 F. 2d 344 (CA 4 (1968), *cert. denied* 392 U. S. 932, 88 S. Ct. 2283, 20 L. Ed. 2d 1389 (1968), the Fourth Circuit upheld a Travel Act conviction that was founded upon a local official depositing into his bank account an out-of-state check that had been received as a bribe. In *United States* v. *Salsbury*, 430 F. 2d 1045 (CA 4 1970), the Fourth Circuit upheld a Travel Act conviction that was founded upon the defendant cashing out-of-state checks in connection with a gambling operation. In both cases the court held that given the broad language of the statute, it was immaterial that the use of the interstate facilities was tangential to the illegal business.

Subsequently the Supreme Court in *Rewis* v. *United States*, 401 U. S. 808, 91 S. Ct. 1056, 28 L. Ed. 2d 493 (1971), held that conducting a gambling operation frequented by out-of-state bettors does not, without more, constitute a violation of the Travel Act. The court began by noting that the ordinary meaning of the language of the Travel Act did not seem to cover the acts complained of:

> "Section 1952 prohibits interstate travel with the intent to 'promote, manage, establish, carry on, or facilitate' certain kinds of illegal activity; and the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity." 401 U. S. at 811.

The court then exploded the legislative history and determined that Congress did not intend the Travel Act to apply to criminal activity solely because it is at times patronized by out-of-state customers. The court concluded as follows:

> "In short, neither statutory language or legislative history supports such a broad-ranging interpretation of 1952. And even if this lack of support were less

apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, *Bell* v. *United States*, 349 U. S. 81, 83 (1955)." 401 U. S. at 812.

Subsequent to the *Rewis* decision the Seventh Circuit decided a number of cases dealing with whether a minimal and incidental use of an interstate facility can give rise to a violation of the Travel Act. *United States* v. *Altobella*, 442 F. 2d 310 (CA 7 1971); *United States* v. *McCormick*, 442 F. 2d 316 (CA 7 1971); *United States* v. *Isaacs*, 493 F. 2d 1124 (CA 7 1974), *cert. denied* 417 U. S. 976, 94 S. Ct. 3184, 41 L. Ed. 2d 1146 (1974). In *Altobella* the victim of an extortion scheme cashed an out-of-state check in order to pay the defendants. The defendants knew that this check would have to be cashed, and the check did, in fact, travel interstate. In *McCormick* the defendant placed an advertisement in a local newspaper seeking salesmen to peddle lottery tickets, A number of copies of the ad were mailed to the newspaper's out-of-state subscribers. *Isaacs* involved a bribery scheme in which the government's proof supporting federal jurisdiction rested on evidence that three of the checks used to distribute a portion of the proceeds had traveled interstate after being deposited by the defendants. In each of these cases the Seventh Circuit reversed the Travel Act conviction, holding that there must be something more than a minimal and incidental use of a facility of interstate commerce to satisfy the jurisdictional element of a Travel Act offense. The Seventh Circuit based this interpretation of the Travel Act in part on certain language in *Rewis* and in part on a reluctance to impinge on sensitive federal-state relationships by interpreting the Act broadly.[4]

[4] *Altobella* was filed three days after *Rewis*. The court in *Altobella* did refer to the *Rewis* decision in footnote 12, but did not rely on it. Rather, the court relied on the concept of federalism. The court in *McCormick* and *Isaacs* did rely in part on *Rewis*.

The Second Circuit dealt with this problem in *United States* v. *Archer*, 486 F. 2d 670 (CA 2 1973), *reh. denied*, *id.*, at 683 (per curiam). This case involved a bribery scheme in which the basis of jurisdiction was one phone call made by a government agent from Paris and received by one of the defendants in New York. The court reversed the convictions, and there is language in the court's opinion which indicates that it is adopting the Seventh Circuit's interpretation of the Travel Act. But in responding to the government's p...ition for a rehearing, the court explained its decision in very narrow terms:

> "While the Government professes alarm at the precedential effect of our decision, we in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves and that this was not met here. We adhere to that holding and leave the task of further line-drawing to the future." 486 F. 2d at 685-686.

Subsequent to all these decisions the Fourth Circuit was again faced with the issue in *United States* v. *LeFaivre*, 507 F. 2d 1288 (CA 4 1974), *cert. denied* 420 U. S. 1004, 95 S. Ct. 1446 (1075). In *LeFaivre* the defendants were charged with participating in a gambling operation in which the basis of jurisdiction was the fact that fourteen (14) out-of-state checks offered in settlement of bets passed through interstate banking channels in the clearing process after having been cashed or deposited by one of the defendants. The Fourth Circuit declined to adopt the Seventh Circuit's interpretation of the Travel Act and reaffirmed the holdings of *Wechsler* and *Salsbury* that any use of an interstate facility in furtherance of one of the unlawful activities defined

in the Act is enough to satify the jurisdictional requirements of the Travel Act.[5]

We also decline to adopt the approach taken by the Seventh Circuit and, rather, apply the rule stated by the Fourth Circuit in *LeFaivre.*

The court in *LeFaivre* pointed out that the Supreme Court in *Rewis* was speaking in the context of a fact situation that would have required extending the coverage of the Act beyond its literal language.[6] It was in this context that the Supreme Court discussed legislative history, federalism, and the need for lenity in interpreting a criminal statute.[7] Here, as in *LeFaivre,* the facts of the case bring it within the plain meaning of the Travel Act, and thus *Rewis* is inapposite. Facilities in interstate commerce were used every time an out-of-state check was cashed or deposited and then subsequently traveled interstate. As the court in *LeFaivre* noted:

> ". . . when a statute on its face clearly covers certain activity, as in the instant case, we believe a court should

[5]The Fourth and Seventh Circuits have at various times attempted to reconcile their respective views on this issue. At this point any such attempt on our part would be fruitless. In *Isaacs* the Seventh Circuit acknowledged that its view was in conflict with the ruling made in *Wechsler,* 493 F. 2d at 1149. In *LeFaivre* the Fourth Circuit acknowledged that unless the Seventh Circuit decisions were limited to their precise factual settings, and there is little evidence in the language of these decisions that they are so limited, then its view was in conflict with these decisions. 507 F. 2d at 1294.

[6]Additional support for this view is found in the case of *United States* v. *Villano,* ___ F. 2d ___ (CA 10 January 10, 1976). There, the defendants were convicted of participating in a Colorado gambling operation. The use of interstate facilities was limited to agents of the defendants taking bets in Nebraska and making interstate phone calls to Colorado. The court upheld the convictions. The court noted that *Rewis* did not compel a contrary result, since there the Supreme Court focused on the fact that the interstate activity was limited to the acts of the patrons.

[7]The Seventh Circuit in *Altobella* acknowledged that the Travel Act can be read to cover a case where the use of a facility in interstate commerce is minimal and incidental. 442 F. 2d at 311.

> accept the statute as written and avoid plunging into the murky waters of legislative history in an attempt to fathom whether Congress really intended to reach what the language of its statute *does* reach." (Emphasis in original.) 507 F. 2d at 1295.

The court in *LeFaivre* also dealt with the argument that federal criminal statutes should be narrowly construed to avoid impinging on sensitive federal-state relationships. The court noted that:

> "How far Congress should extend federal criminal jurisdiction is a matter of interest and concern to the judicial branch. But resolution of the question is not for us. There is an appropriate role, however, for the executive branch. We agree with Judge Friendly, who said in *Archer,* 486 F. 2d at 678, that the responsibility for keeping federal criminal prosecutions within appropriate bounds for a federal system rests, in the first instance, with United States attorneys under the active guidance of the Attorney General. *See* Friendly, Federal Jurisdiction: A General View 55-61 (1973).
>
> "It should be emphasized that the exercise of prosecutorial discretion is common. The Mann Act fits the adulterer who chooses another state as the place of assignation, but such cases rarely if ever appear in a federal court. When an Asheville, North Carolina, thief steals a car, he has two or more choices of how to drive it to Charlotte—no one of which is better than another. But one way will take him through the edge of South Carolina, and that 'happenstance' will undoubtedly invoke the Dyer Act. These two kinds of cases—prostitution and car theft—are triggered identically as is the application of the Travel Act."
> 507 F. 2d at 1296.

There was sufficient evidence to support the trial court's finding that the appellant used a facility in interstate commerce to facilitate the carrying on of an illegal business.

III. TIMING OF USE OF A FACILITY IN INTERSTATE COMMERCE

The appellant asserts that there was no evidence that she performed any illegal acts after the checks traveled interstate. The Travel Act does require that illegal acts be performed after the use of a facility in interstate or foreign commerce. Appellant relies on *United States* v. *Zemater*, 501 F. 2d 540 (CA 7 1974). There, the use of a facility in foreign commerce consisted of certain of the defendants traveling to Saigon and causing others to travel to Saigon. The illegal activity that was charged in the indictment took place at a point in time prior to this trip. The court reversed the convictions in part because the illegal activity took place prior to the use of a facility in foreign commerce. In *Zemater* there was only one use of a facility in foreign commerce. In the instant case there was a series of fifteen (15) checks, and the traveling interstate of each of these checks constituted the use of a facility in interstate commerce. Each of the checks constituted payment for illegal activities, and thus fourteen (14) of the checks were followed by additional illegal activity. The court in *LeFaivre* was met with a similar situation. A series of out-of-state checks were involved, and they were each payments on bets that had been made. There, as here, the appellants argued that the illegal activity preceded the use of a facility in interstate commerce. The court held that:

> "And since the gambling operation was on-going over a period of years, there can be no doubt that LeFaivre and the others continued to perform their illegal activity *after* the use of interstate facilities, thus meeting the Act's requirement that a person engaged in the substantive offense following the involvement of interstate commerce." (Emphasis in original.) 507 F. 2d at 1291.

There was sufficient evidence that the defendant performed illegal acts after the use of a facility in interstate commerce.

IV. PUBLIC TRIAL

Appellant asserts that the exclusion of spectators from the courtroom during the testimony of one of the government's witnesses was a violation of her right to a public trial. Prior to the testimony of Tracy Tippit, a former dancer at the Pink Pussycat and one of two principal witnesses for the prosecution, the trial judge made the following statement:

> "I am going to eliminate from the courtroom spectators, other than accredited members of the press. There is reason to believe that this next witness has a fear of the courtroom and the persons that might be in it, and this Court is unable to say that this fear is unreal or imaginative, and accordingly, I propose to proceed in that fashion."

This is the only thing in the record which indicates why the judge ruled as he did. The appellant made a timely objection to this ruling. The objection was overruled. The testimony of this witness was then taken in the absence of spectators. Members of the press were allowed to remain in the courtroom. At the close of her testimony the spectators were permitted to reenter the courtroom. When Ms. Tippit was recalled by the government as a rebuttal witness, the judge announced that spectators would not be excluded.

The purpose of the Sixth Amendment public trial requirement is to guarantee that a defendant will be fairly dealt with and not unjustly condemned. *Estes* v. *Texas,* 381 U. S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965); *In Re Oliver,* 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948). The right to a public trial is not absolute but rather must be balanced against other interests which might justify the closing of the courtroom to the public. *United States ex rel Lloyd* v. *Vincent,* 520 F. 2d 1272, 1274 (CA 2 1975). The propriety of the trial court's action depends on the particular circumstances of the case. *Aaron* v. *Capps,* 507 F. 2d 685 (CA 5 1975). If it is determined that the trial court improperly excluded the public, prejudice is implied and an affirmative showing that the defendant was harmed is unnecessary to justify reversal. *United States ex rel. Bennett* v. *Rundle,* 419 F. 2d 599 (CA 3 1969); *Tanksley* v. *United States,* 145 F. 2d 58 (CA 9 1944); *Davis* v. *United States,* 247 F. 394 (CA 8 1917).

Here, the trial court acted because of the witness' fear of testifying. A number of courts have held that this is a proper basis for excluding spectators from a trial. *United States ex rel. Bruno* v. *Herold,* 408 F. 2d 125 (CA 2 1969); *United States ex rel. Orlando* v. *Fay,* 350 F. 2d 967 (CA 2 1968), *cert. denied sub nom. Orlando* v. *Follette,* 384 U. S. 1008, 86 S. Ct. 1961, 16 L. Ed. 2d 1021 (1965). *Geise* v. *United States,* 262 F. 2d 151 (CA 9 1958), *reh. denied* 265 F. 2d 659 (CA 9 1959); *United States ex rel. Smallwood* v. *LaValle,* 377 F. Supp. 1148 (E. D. N. Y. 1974), and cases cited therein at fn. 4; see generally 48 A.L.R. 2d 1436.

The appellant relies on *United States* v. *Kobli,* 172 F. 2d 919 (CA 3 1949). There, the trial court in a Mann Act case involving the transporting of a young woman to a house of prostitution excluded all of the spectators because of the fact that many young girls were in the courtroom. The Third Circuit held that this exclusion was improper

because it was not limited in scope to those persons who the judge had reason to believe should have been excluded. Here, there is no problem with the scope of the judge's order, since he had apparently determined that the witness was afraid of any spectator being present in the courtroom.

The appellant also relies on *Tanksley* v. *United States, supra.* There, the trial court in a rape case in which the defense was consent excluded spectators for the entire trial to relieve the complaining witness of embarrassment. The Ninth Circuit held that this exclusion was improper. The court pointed out that the complaining witness would be embarrassed in any rape case where the defense was consent. The court then held that it would be a denial of the defendant's presumption of innocence to hold that a complaining witness must be relieved of this embarrassment. Here, unlike the situation in *Tanksley,* the judge did exclude the spectators for a proper reason—the witness' fear of people in the courtroom.

The problem here, then, is not with the scope of the order or the reason for it, but rather with the sufficiency of the record made by the trial judge to support his finding that the witness was afraid of persons in the courtroom. The standard to be applied in determining whether there is a sufficient record to support a trial judge's finding that grounds exist to exclude spectators from a courtroom is whether there has been an abuse of discretion. *United States ex rel. Lloyd* v. *Vincent, supra,* 520 F. 2d at 1275. We cannot say that the trial judge abused his discretion in excluding spectators other than members of the press for a limited portion of the trial. We would however, note, as did the court in *Vincent,* that the better course would have been for the trial judge to hold an evidentiary hearing prior to deciding that there was sufficient reason to exclude spectators.

The conviction is affirmed.

Supreme Court U. S.
FILED
OCT 26 1976
MICHAEL RODAK, JR., CLERK

No. 76-77

In the Supreme Court of the United States

OCTOBER TERM, 1976

JAMES HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported. The order of affirmance is reported at 535 F. 2d 1255.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1976, and a petition for rehearing with suggestion for rehearing *en banc* was denied on June 21, 1976 (Pet. App. B). Tne petition for a writ of certiorari was filed on July 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether the evidence established that petitioner's illegal activities occurred subsequent to his use of a facility in interstate commerce.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of having used a facility in interstate commerce to promote an unlawful activity, in violation of 18 U.S.C. 1952. He was sentenced to two years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. A).

The evidence at trial established that petitioner was the owner and operator of the "Jai-Alai Club," a nightclub located in Newport, Kentucky (Tr. 106). Jack Trainer was a customer of the nightclub on a number of occasions between August 1973 and February 1974. During these visits, Trainer bought drinks for striptease dancers employed by the club, who then engaged in sexual activity with Trainer either at tables in the main room of the nightclub or in an upstairs bedroom (Tr. 107-135). During the six-month period covered in the indictment, approximately 400 sheets and pillowcases were delivered by a linen supply company for use in the nightclub (Tr. 46-51).

Trainer paid petitioner for the sexual services he received by purchasing overpriced drinks for the female employees who performed the sexual acts (Tr. 132, 157). These payments were made by checks drawn on Trainer's account. At petitioner's request, the checks—which ranged from $291 to $2,320—were made payable to the apparently non-existent James Harris Construction Company (Tr. 86, 108). Petitioner cashed nine of Trainer's checks at a bank in Newport, Kentucky. The checks were then delivered to Trainer's bank in Cincinnati, Ohio, for payment, and the proceeds were remitted to the Kentucky

bank (Tr. 88-103). The movement of Trainer's checks and the return payments in interstate commerce provided the jurisdictional basis for this Travel Act prosecution.

ARGUMENT

1. Petitioner contends (Pet. 17-21) that the evidence failed to establish that he was carrying on an unlawful activity proscribed by the Travel Act. The Travel Act, however, defines "unlawful activity" to include "prostitution offenses in violation of the laws of the State in which they are committed," 18 U.S.C. 1952(b)(1), and the indictment in this case alleged that petitioner used the facilities of interstate commerce to carry on "a business enterprise involving prostitution, lewdness, and assignation, in violation of the laws of Kentucky, under K.R.S. 436.075." The state statute defines prostitution as including "sexual intercourse for hire" and "indiscriminate sexual intercourse without hire" and defines "lewdness" as "any indecent or obscene act." K.R.S. 436.075(1)(1962). Furthermore, in addition to prostitution, the statute prohibits aiding or abetting prostitution and "receiv[ing] any person for the purpose of lewdness, assignation, or prostitution into any * * * place, structure, or building." K.R.S. 436.075(2)(1962).

Although petitioner argues that there was insufficient direct proof of the sexual intercourse required to establish "prostitution" under the Kentucky statute and that the conduct engaged in at the nightclub was not "lewd" under K.R.S. 436.075 (1962), these contentions involve an interpretation of state law and the application of that law to the facts of this case. Accordingly, they do not warrant further review by this Court.[1] Indeed, the Kentucky

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[1]Petitioner apparently contends that the evidence failed to show that he personally participated in any lewd acts or acts of prostitution with the customers. But the indictment alleged that he carried on a business enterprise involving such activities, not that he personally participated in the sexual acts.

statute alleged to have been violated by petitioner has since been repealed, and the current state prostitution statute does not limit the term "prostitution" to acts involving sexual intercourse, nor does it use the term "lewdness." Rather, it now expressly provides that a person is guilty of prostitution when he or she engages or agrees or offers to engage in sexual conduct (sexual intercourse or any act of sexual gratification involving the sex organs) with another person in return for a fee. K.R.S. 529.010, 529.020 (1975 repl.).

In any event, the court below correctly found that the "evidence and permissible inferences" were sufficient to support the jury's verdict (Pet. App. 23). There was direct evidence that petitioner's employees engaged in acts of sexual gratification for hire and that petitioner collected the payments for this activity. These facts, together with proof that a large number of sheets and pillowcases were delivered for use in the nightclub's upstairs bedroom and that petitioner requested and received the payments for sexual favors under a fictitious name, sufficiently established that petitioner was "receiv[ing] any person for the purpose of lewdness, assignation, or prostitution" into his nightclub, in violation of the Kentucky statute.[2]

2. Petitioner also contends (Pet. 12-16) that, because the sexual acts obtained in return for each of Trainer's checks preceded the movement of that check in interstate

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[2]Contrary to petitioner's assertion (Pet. 18), the record clearly established that the dancers employed at the nightclub participated in the sexual activities with the customers (Tr. 111, 132, 157). Similarly, the conduct occurred not only in seclusion, as petitioner suggests, but also at tables in the main room at the nightclub (see Pet. 8) "under circumstances where it was probable that it might have been observed by the public." *Commonwealth* v. *Hamilton*, 237 Ky. 682, 36 S.W. 2d 342 (indecent exposure prosecution).

commerce, the evidence was insufficient to establish that he performed any illegal activities subsequent to his use of an interstate facility, as required by Section 1952. The evidence showed, however, that petitioner was operating an ongoing illegal activity from August 1973 to February 1974. Each of the nine out-of-state checks cashed by petitioner during that six-month period constituted payment for sexual activity at the nightclub on separate occasions. Therefore, the interstate travel of at least eight of the checks was followed by additional conduct in violation of Kentucky law. As the court of appeals noted (Pet. App. 23), after petitioner utilized facilities in interstate commerce to cash the checks, "a major portion of the proceeds of such checks were subsequently employed, in accordance with [petitioner's] specific intent, to facilitate the carrying on of a business enterprise, * * * which involved prostitution, lewdness or assignation in violation of former K.R.S. 436.075." See also *United States* v. *Eisner*, 533 F. 2d 987, 992-993 (C.A. 6) (Pet. App. 36-37), pending on petition for a writ of certiorari, No. 76-31. *United States* v. *LeFaivre*, 507 F. 2d 1288, 1291 (C.A. 4), certiorari denied, 420 U.S. 1004.[3]

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[3]Petitioner's assertion (Pet. 12-16) of a conflict among the circuits on this issue is incorrect. In *United States* v. *Zemater*, 501 F. 2d 540 (C.A. 7), the court reversed the defendant's Travel Act conviction because there had been only one use of a facility in interstate commerce and that use had not preceded any illegal activity. The other cases cited by petitioner (and his quotation (Pet. 12-13) from the opinion in *United States* v. *Eisner*, *supra*, suggesting the existence of a conflict among the circuits) concern the extent of the use of an interstate facility necessary to satisfy the Travel Act, not—as here—the timing of that use. Even on that issue, however, recent decisions of the Seventh Circuit indicate there may no longer be a conflict. See *United States* v. *Peskin*, 527 F. 2d 71 (C.A. 7), certiorari denied, No. 75-1514, October 4, 1976; *United States* v. *Rauhoff*, 525 F. 2d 1170 (C.A. 7).

Petitioner also alleges (Pet. 3), without elaboration, that he was prejudiced by the admission of testimony of an employee at the Jai-Alai Club that petitioner had hired her to work as a prostitute at the club

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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several months prior to the period covered by the indictment (Tr. 138-140). Any error was cured, however, by the trial court's explicit instruction that the jury should disregard the witness's testimony (Tr. 188).